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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 727

AIR PRODUCTS, INC.,
Petitioner,

vs.

BOSTON METALS COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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Dated: New York, N. Y.,
May 8, 1952.

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Opinions Below

The opinion of the District Court for the District of Maryland (R. I, p. 80) is reported in 98 F. Supp. 719. The opinion of the Court of Appeals for the Fourth Circuit (R. III, p. 39) is reported in 193 F. 2d 535.

Jurisdiction

Petitioner* invokes the jurisdiction of this Court under 28 U. S. C. A. § 1254(1).

Statement

The sole issue below was whether Claims 11, 13 and 19 of Air Products' Anderson patent No. 2,480,093 were valid.

The Court of Appeals held they were not.

* Petitioner is hereinafter referred to as "Air Products"; Respondent as "Boston Metals." Parentheses and italics within quotes are ours unless the contrary is indicated.

The Anderson patent, entitled "Method of and Apparatus for Pumping Liquid Oxygen" (R. I, pp. 109-119) discloses both an apparatus and a method for the separation of oxygen from the other constituents of the air and storing the oxygen, as a high pressure gas, in the familiar heavy steel cylinders, four to five feet tall and about nine inches in diameter, in which it frequently is marketed.

The entire apparatus and each step of the fractionating, pumping and storing operations are in the prior art, as, in substance, the Anderson patent concedes (R. I, p. 115: c. 2, ll. 25-26, 35-36; p. 116: c. 4, ll. 18-20). However, the patent notes that "The step of pumping liquid oxygen has proven in practice to be one of great difficulty." This, it says, grows from the fact that friction in the pump creates heat in the liquid oxygen which brings the oxygen above its boiling point, thus turning it into a gas "which locks the suction and puts the pump out of commission" (R. I, p. 116: c. 3, ll. 62-75). To correct this "difficulty" Anderson employs the very cold nitrogen gas which is derived from the separation operation and which is largely a waste product, to reduce the temperature of the oxygen in advance of the pump* so that the pump friction cannot heat the oxygen to its boiling point. This is known as "subcooling."

This is the sum of the asserted novelty of the patent in suit (see R. I, p. 116: c. 4, ll. 7-15). At most it is an improvement on a single step in an old process.

The claims in issue, however, are not restricted to this step but go, broadly, to the steps of drawing liquid oxygen from the column, subcooling it by nitrogen from the column, pumping it and converting it to a gas (R. I, pp. 118-119).

In the Court of Appeals, Boston Metals relied particularly on the German Polard patent No. 495,795 of 1930

* The patent describes a further step not relevant to the claims in issue.

and on Eichelman patent No. 1,976,388 of 1934 and German Messer & Grassmann patent No. 712,480 of 1941. The Polard and the German Messer patents recognized the pumping "difficulty" to which Anderson addressed himself and showed precisely Anderson's means of overcoming that "difficulty."

The Polard patent would be a blanketing anticipation of Anderson except for a detail which the Court of Appeals referred to as follows (R. III, p. 42):

> "Polard mentions apparatus for pumping liquid oxygen from a pool in 'a container;' Anderson mentions pumping liquid oxygen from a pool in the 'column.' It is open to question whether Polard is limited to pumping from a particular type of container; also whether Anderson is strictly limited to pumping from the column."

The Court might have been more categorical, for Polard and Anderson show that neither is so limited. Polard taught that his means of subcooling the oxygen in advance of the pump could "be generally used" (R. I, p. 175: ll. 44-47), and Anderson explicitly stated that his method was applicable to pumping from a storage container (R. I, p. 115: c. 1, ll. 4-8) as well as from the column, thus demonstrating that the operation is not affected by the nature of the container from which the oxygen is pumped. Clearly, therefore, the Court of Appeals was justified in its conclusion that—

> "In any event, this difference, *if it exists,* is neither vital nor sufficient to constitute patentable invention" (R. III, p. 42).

The Eichelman patent (R. I, pp. 153-156) showed every element of Anderson and every step of the method of Anderson. Its pumping step, however, *may* have been liable to vapor-lock. But, as the Court of Appeals said, "the problem of vapor-lock had been solved by Polard, Hansen and Messer and Grassmann" (R. III, pp. 42-43; see also,

R. I, pp. 172-177, 163-171, 178-183). And, again in the words of the Court of Appeals—

> "Unlike Polard and Hansen, *but like Anderson,* Messer shows the liquid oxygen initially collected, not in a storage container, but in a pool in the column. Messer also shows * * * that the oxygen line runs through a heat exchanger and 'is super cooled * * * by the nitrogen flowing from the separating column directly connected with it' " (R. III, p. 43—italics by Court; see also, R. I, p. 182: ll. 66-69).

To use the method of Eichelman with its single imperfect step perfected, as taught by the German Messer patent, does not amount to invention.

The oxygen apparatus, the operation of which is here accused, was first sold by its maker thirteen months *before* the issue of Anderson patent No. 2,480,093 (R. I, pp. 20-21, 33; R. II, p. 56). It had been designed in accordance with the teachings of United States Messer patent No. 2,133,105 of 1938 (the substantial equivalent of Eichelman) and the German Messer patent, and its operation employed precisely the method of those patents (R. I, pp. 15-33).

Argument

The petition here presents no special and important reasons why the writ should be granted. There is no conflict between the decisions of any Courts of Appeals. There is no important question of Federal law involved. There is no Federal question which has been decided in a way in conflict with any decisions of this Court. And there has been no departure here from the accepted and usual course of judicial proceedings.

Air Products' petition for certiorari states that the Court of Appeals erred "In holding the method claims in suit invalid on the basis of prior art which, while lacking a teaching of the claimed method, discloses apparatus which *might,*

by *modification*, be employed for carrying out the novel and efficacious claimed method" (Petition, p. 3—italics by Petitioner).

This is factually inaccurate. The title of the Polard patent is "A *method* of handling liquefied gases by pumping" and while, like Anderson, apparatus is shown, Polard also shows *the method* of operating that apparatus. Similarly, the prior art Eichelman patent disclosed *a method* (R. I, p. 154: ll. 65-66; see also, ll. 40-54, 77-110; p. 155: ll. 1-49) identical with the method of the patent in suit except that operation at the pumping step may have caused vapor-lock. And the German Messer patent disclosed precisely the way employed by Anderson to cure vapor-lock if, in fact, it developed (R. I, p. 181: ll. 25-33; p. 182: ll. 65-72, 80-89).

Air Products goes on to assert that the Court of Appeals erred in not following the rule of *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403 and in failing to find that the Anderson method met the test of *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147. Air Products never suggested that the *Carnegie* case had *any* application here until following the decision of the Court of Appeals. Then, attempting to take advantage of the Court's use, on several occasions, of the words "elements" or "apparatus" instead of "steps" or "method"*—Air Products first asserted the relevance of the *Carnegie* case in its petition for rehearing. However, that case is not pertinent since the Court of Appeals did not hold the claims in suit antici-

* Thus, the Court said, "The Polard patent discloses the essential *elements* of Anderson * * *" (R. III, p. 42) and "Clearly, the essential features of the Anderson *apparatus* were all old * * *" (R. III, p. 45), but, as indicated, all the patents referred to by the Court showed not only apparatus—and elements—but also a method, and the Court of Appeals had this clearly in mind, as is shown by the balance of both quotations above. Each of these refers specifically to method (see also, R. III, p. 44) as does the discussion by the Court of Hansen (R. III, pp. 42-43) and of the German Messer patent (R. III, p. 43).

pated by "a piece of mechanism by which the process *might* have been performed" (Petition, p. 2—italics by Petitioner; cf., 185 U. S. 403, 422). Instead, the method claims were held not to represent invention over the methods of the prior patents discussed above.

The decision below exactly accords with this Court's recent decisions in *Dow Co.* v. *Halliburton Co.*, 324 U. S. 320, and *Jungersen* v. *Ostby & Barton Co.*, 335 U. S. 560.

While the *A. & P.* case dealt specifically with an apparatus patent, its statement of the law has equal application to *any* type of patent. And the following statement is entirely apposite here:

> "Patents cannot be sustained when * * * their effect is to subtract from former resources freely available to skilled artisans. * * * This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly" (340 U. S. 152-153).

Conclusion

This case presents no question of law and no question of general importance. It is controlled entirely by its own facts and those facts do not justify the grant of the writ sought.

Respectfully submitted,

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